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Supreme Court, U.
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MICHAEL RODAK, JR., C

No.

In the
Supreme Court of the United States

JACQUELINE JARRETT,
Plaintiff-Petitioner,

vs.

WALTER JARRETT,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioner, Jacqueline Jarrett, respectfully prays that a Writ of Certiorari issue to review the sharply divided judgment and opinion of the Supreme Court of Illinois entered in this proceeding on December 20, 1979, which deprived her of custody of her children solely because she elected to reside with an unmarried adult male. All other evidence demonstrated (1) that Jacqueline was a kind, affectionate mother and that she had not neglected her children in any way as a result of the relationship; and (2) no fault was found or disclosed as to the appearance, health and stability of the children or the home. (App. 27a)

OPINION BELOW

The original Opinion of the Supreme Court of Illinois is set forth in Appendix A to this Petition. The Opinion

was modified on February 1, 1980, upon denial of rehearing in the manner set forth herein in Appendix B. An additional written dissent was subsequently filed on February 12, 1980, and is set forth herein in Appendix C. The Opinion of the Appellate Court of Illinois is set forth in Appendix D. The full text of the Supreme Court's Opinion is reported at 400 N.E.2d 421. The full text of the Appellate Court Opinion is set forth at 64 Ill. App. 3d 932, 382 N.E.2d 12.

JURISDICTION

The Opinion and Judgment of the Supreme Court of Illinois was entered December 20, 1979. A timely Petition for Rehearing was filed and was denied with modification of the Opinion on February 1, 1980. A supplemental written dissent of Justice Moran of the Court was delivered on February 12, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The State of Illinois affords no further procedure to remedy the violation of petitioner's constitutionally guaranteed rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Equal Protection clause and the Due Process clause of the Fourteenth Amendment. Also involved is the constitutional propriety of the statutory provisions of the Illinois Marriage and Dissolution of Marriage Act as applied by the Illinois Supreme Court to this cause. ILL.REV.STAT. 1977, ch. 40, pars. 602, and 610. The text of these statutory provisions in pertinent part is set forth in Appendix E.

QUESTIONS PRESENTED FOR REVIEW

1. Does the decision and opinion of the Supreme Court of Illinois which establishes a conclusive presumption of the Court's subjective perception of possible future "moral harm" to children solely because of their residence with unmarried adults, a presumption which is then used to terminate the custodial rights of petitioner, violate her constitutional right to Due Process and Equal Protection of the Laws under the Fourteenth Amendment as stated by this Court in *Stanley* v. *Illinois,* 405 U.S. 645 (1972)?

2. Does the construction and application of the provisions of the Illinois Marriage and Dissolution of Marriage Act by the Supreme Court of Illinois so as to deprive petitioner of her children solely because of her residence with an unmarried adult infringe upon petitioners' constitutional rights to Due Process and Equal Protection of the Laws under the Fourteenth Amendment?

REASONS FOR GRANTING THE WRIT

The Supreme Court of Illinois has once again upheld the use of a conclusive presumption in a custody matter to terminate the custodial rights of petitioner to her three children. The *Jarrett* decision of the Illinois Supreme Court declines to apply the principle and ruling of this Court in *Stanley* v. *Illinois,* 405 U.S. 645 (1972). This Court there held that the employment of an irrebutable presumption upon the fundamental interests of parents and their children in custody matters is an unconstitutional violation of the rights of such parents to Due Process and Equal Protection under the Fourteenth

Amendment. By resorting to the use of an irrebuttable presumption in denying Jacqueline Jarrett of the right to custody of her children, the Supreme Court of Illinois changed the focus in a child custody proceeding from the traditional concern for the welfare and best interests of the child to a focus on the conduct of a custodial parent without regard to its effect on the child. As with *Stanley*, the *Jarrett* presumption irrationally and unjustly directly affects and has a chilling affect on not only the constitutional rights of Jacqueline Jarrett, but also the constitutional rights of over one million unmarried parents similarly situated now and hereafter in the State of Illinois and other states in the United States.

The precedent-setting effect of the *Jarrett* decision can be accurately forecast since the statutory framework in the Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. ch. 40, has its foundation in the Uniform Marriage and Divorce Act, as promulgated by the National Conference of Commissioners on Uniform State Laws in 1970, as amended, and subsequently approved by the American Bar Association. The guidelines established by the Uniform Marriage and Divorce Act are shared throughout most of the United States either by statutory application or judicial interpretation. *Divorce in 50 States, an Overview as of August 1, 1979,* by Dr. Doris Jonas Freed and Professor Henry H. Foster, Family Law Section of the American Bar Association. The application of the presumption created by the *Jarrett* decision in child custody proceedings in the courts of our sister states imports the significance and episodic consequences of permitting such a precedent to stand. A status, defined as a single parent living with a person of the opposite sex, which creates an environment "endangering seriously the physical, mental, moral

or emotional health of a child" without proof of harm and absent evidence of detrimental effect to the child, constitutes, a judicially established conclusive presumption. This presumption persists despite evidence to the contrary, and concludes that harm to a child, will occur at some time in the future.

To establish the existence of such a status as the basis for a transfer of the custody of a child from a custodial parent to a non-custodial parent effects the greater proportion of our population. According to the United States Census Bureau in 1978, there were 12 million children under the age of 18 in single parent homes. The Census parents to a non-custodial parent affects the greater pro- Bureau established that nearly one-half of all children born in the 1970's will spend a meaningful part of their lives before age 18 in a single parent home. If this child's custodial parent lives with a person of the opposite sex, irrespective of the actual effect of such an environment on the child, the harm is presumed to occur, if not now, then in the future, and that child will be taken from one parent and awarded to the other. With an additional one million children per year involved in a dissolution of their families, the consequences of the *Jarrett* decision are ever widening. If a parent of any of these children elects to cohabit with a person of the opposite sex for any reason, be it social, physical, emotional, psychological, economic, moral, or just personal, that fact established in a custody modification proceeding triggers a change of custody without regard to the effect of that chosen status on the child, without investigation into the best interest of the child. The consequences of the *Jarrett* decision on these millions of single parents and children have been recognized by the news media, prompting extensive multimedia coverage nationwide in newspapers, magazines,

radio and television commentary and debate. The judicial presumption created by the Supreme Court of Illinois in the *Jarrett* decision is being discussed and debated in courtrooms, family law seminars and laws schools across the country.

STATEMENT OF THE CASE

Petitioner, Jacqueline Jarrett, was divorced from respondent, Walter Jarrett, in the Circuit Court of Cook County, Illinois, on December 6, 1976. Based upon a finding of fact that Jacqueline Jarrett was a fit and proper person to have the sole care, custody, control and education of the parties' three daughters, Kathleen, Deborah and Susan, now ages fifteen, thirteen and ten, respectively. Jacqueline was awarded custody of the children. The respondent was granted reasonable visitation, exercising that visitation in his apartment from Saturday evenings until Sunday at 5:00 p.m.

Since December, 1976, the respondent was aware of a relationship between Jacqueline Jarrett and Wayne Hammon. In April, 1977, petitioner related to respondent that Wayne Hammon would be moving in with her and the children. (R. 7). The respondent said that he would see "if there wasn't something he could do about that." (R. 8).

A Custody Modification Petition against Jacqueline Jarrett was filed the following week stating that her relationship with Wayne Hammon was contrary to Walter Jarrett's personal beliefs and that he did not wish his children to be raised in an atmosphere he considered immoral. (R. 12). The respondent conceded at trial, however, that each weekend when he called for the children, they always appeared clean, healthy, well-dressed and well-nourished. (R. 14) The respondent further admitted at trial that he had not discussed his personal beliefs with

his children, except once with his oldest daughter, Kathleen, and he said that she expressed no objections to Wayne Hammon's presence in the home, except occasionally he would yell at them when they made noise or something of that nature. (R. 15, 16).

Wayne Hammon testified that the children call him "Wayne" and that he was acquainted with the neighbors and had attended school functions with the children. (R. 21, 22). Mr. Hammon helps the children with their homework; and they go to shows, play games and enjoy other activities as a family unit. (R. 26); He and the children had fun together and got along. He brings them little gifts from time to time and gives them their allowances from his own money. (R. 37, 38). Jacqueline testified that the children are very fond of Wayne and show him affection.

The children have lived in the family home all of their lives. (R. 23). Jacqueline testified that her children did not want to move from their home. (R. 30). Jacqueline stated that the love she and Wayne feel for each other very definitely manifests itself in the children and that she feels an obligation and commitment toward Wayne Hammon. She does not want to get married now because it is too soon after the divorce and she does not believe that a marriage license makes a relationship between two people. Wayne Hammon testified that he considered marriage to Jacqueline a possibility, but not right at this time.

Wayne Hammon and Jacqueline Jarrett have discussed their lifestyle with the children from time to time in terms of different people having different beliefs and that some people feel it is wrong for two people to live

together without a marriage license, but that it was not their personal feelings; and that their father felt one way about it while they felt another. They disagreed with this moral judgment and testified that what mattered to them was the love they felt for each other. (R. 19). Jacqueline does not want her children to be duplicates of herself and wants her children to make their own decisions when they become adults. She wants them to have their own values as long as they are comfortable with themselves and do not hurt anyone. (R. 34, 37).

At the close of the testimony and upon this evidence, the trial court ordered Jacqueline Jarrett stripped of custody of the children, proclaiming that it was "necessary for their moral and spiritual well-being and development."

On September 13, 1978, the Appellate Court of Illinois, First District, reversed the trial court decision and its finding that a change of custody was necessary for the children's moral and spiritual well-being and development. The Appellate Court's review of the record held such a conclusion to be unsupported by the evidence and that the trial court's broad discretion was exercised in this matter contrary to the manifest weight of the evidence.

The Appellate Court's analysis of the Record, which has never been challenged, concluded that Jacqueline

> "is a kind, affectionate mother and that she had not neglected her children in any way as a result of the relationship. No fault was found or disclosed as to the appearance, health and stability of the children or the home. The schooling and religious training of the girls was being attended to. . . It is evident that Jacqueline Jarrett, Wayne Hammon and the three children function as a family unit. . . There was no

> noticeable disruption of the children's routine, nor were they subject to the vagaries of an unstable relationship . . . shuffled back and forth. . . There was no evidence of any feeling of guilt or fears aroused in the children. From the evidence in the record before us they are mature adults and their relationship is not relevant here unless it is shown as having a negative effect on the children. In the absence of any such negative effects, we decline to indulge in speculation. . . Similarily we see no evidence to warrant the conclusion that change in custody was necessary to serve the best interests of the children." *Jarrett* v. *Jarrett*, 64 Ill.App.3d 932, 937, 382 N.E. 2d 12 (1978).

The court further stated in its opinion: "We do find it an abuse of discretion to infer, without any evidence in the record, that Jacqueline Jarrett's conduct is detrimental to the children."

The Supreme Court of Illinois, on December 20, 1979, reversed the Appellate Court because "it declined to consider potential future harmful effects . . . on the children." (App. 3a). The creation of a presumption to accomplish this consideration of "potential future harmful effects" became the means to accomplish the Court's stated purpose:

> "To wait until later years to determine whether Jacqueline Jarrett had inculcated her moral values in the children would be to await a demonstration that the very harm which the statute seeks to avoid had occurred." (App. 9a).

The presumptive language set forth by the five man majority of the Supreme Court of Illinois was further defended by the following rationale:

"Measures to safeguard the moral well-being of children whose lives have already been disrupted by the divorce of their parents cannot have been intended to be delayed until there are tangible manifestations of damage to their character. . . . While our comments are focused upon the moral hazards, we are not convinced that open co-habitation does not also affect the mental and emotional health of the children. . . . (App. 9a).

"It is *difficult to predict* what psychological effects or problems *may* later develop from their efforts to overcome the disparity between their conflict with society and their mother's conduct. . . . If the Jarrett children remained in that situation, they *might well* be compelled to try to explain Hammon's presence to their friends and *perhaps* to endure their taunts and jibes. (App. 9a, 10a). *Further,* since the evidence indicated that Jacqueline had not terminated the *troublesome* relationship and *would probably* continue *it in the future,* the trial court properly transferred custody to Walter Jarrett. . . ." (App. 10a). (emphasis added)

This rationale as stated by the Supreme Court of Illinois is in contrast to the final paragraph of the opinion rendered by the Appellate Court of Illinois:

"In the absence of any evidence of such negative effects, we decline to indulge in speculation as to what effects might possibly 'raise their ugly heads' at some future time. *Gehn* v. *Gehn* (1977), 51 Ill. App.3d 946, 949, 367 N.E.2d 508.

"There was neither a specific finding of Jacqueline's unfitness nor evidence which would support that conclusion. Similarily we see no evidence to warrant the conclusion that a change of custody was necessary to serve the best interests of the children. We do find it to be an abuse of discretion for the trial court to impose its own standard in this regard and

> infer, without any evidence in the record, that Jacqueline's conduct in living with a man to whom she was not married was detrimental to the welfare of the children and in and of itself sufficient to disqualify her as the custodian of the children." *Accord, In re Marriage of Moore* (1975), 33 Colo. App. 129, 531 P. 2d 995. (App. 27a, 28a).

Chief Justice Goldenhersh and Justice Moran dissented from the decision of the Supreme Court of Illinois. Justice Goldenhersh, upon examination of the majority opinion, failed to find any issue other than the non-marital status of Jacqueline Jarrett:

> "The effect of this decision is that the plaintiff's cohabitation with Hammon *per se* was sufficient grounds for changing the custody order previously entered. (App. 11a).
>
> "As a legal matter simply stated, the majority has held that on the basis of her presumptive guilt of fornication, a Class B Misdemeanor, plaintiff, although not declared to be an unfit mother, has forfeited the right to have the custody of her children." (App. 12a).

On modification and denial of rehearing, Justice Moran filed an additional written dissent, disapproving of the majority's change of custody and condemning the Supreme Court of Illinois reliance on the use of a conclusive presumption:

> ". . . based solely on a conclusive presumption that harm to the Jarrett children stemmed from Jacqueline's living arrangement. . . . In this case, not one scintilla of actual or statistical evidence of harm or danger to the children has been presented. To the contrary, all of the evidence of record as related by the majority indicates that under Jacqueline's cus-

todianship, the children's welfare and needs were met. Also the trial court expressly declined to find Jacqueline unfit. Nevertheless, the majority's finding of a violation of the seldom-enforced fornication statute effectively foreclosed any further consideration of the custody issue. Instead of focusing solely on the best interests of the children—the "guiding star" (*Nye* v. *Nye,* 411 Ill. 408, 415 (1952))—the majority has utilized child custody as a vehicle to punish Jacqueline for her "misconduct." Such selective enforcement of the statute is inappropriate and especially in child custody context, unfortunate . . . . The constitutional infirmity of the statutory presumption in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), casts doubt on the validity of the judicially created 'presumption' in this case . . . . A hearing at which custody is determined on the basis of conclusive presumption sanctioned by the majority amounts to no hearing at all." (App. 20a).

1. The Due Process Violation

Based on an irrebuttable presumption of future harm, rather than present harm, the Supreme Court of Illinois held that Jacqueline Jarrett's unmarried relationship to Wayne Hammon on a resident basis is sufficient grounds in and of itself to terminate the custody rights to her three children. This decision was reached regardless of the express finding of the Circuit, Appellate and Supreme Courts in Illinois that Jacqueline Jarrett is a good and fit mother, and regardless of the uncontradicted and undisputed evidence that the children are well cared for, healthy and happy in the home environment of their mother and Wayne Hammon.

The Supreme Court of Illinois bases its decision in this parent-child matter on the fact that Jacqueline Jarrett and Wayne Hammon's three-year relationship lacks formal status in the State of Illinois and that her status with Wayne Hammon is contrary to prevailing public policy toward the institution of marriage in the State of Illinois. As a result, the Supreme Court of Illinois has held as a matter of irrebutable presumption, notwithstanding "the absence of any tangible evidence of contemporaneous adverse effect" upon the children, that such status relationships of unmarried adults affect detrimentally the *"future"* well-being of the children. It is *not* that Jacqueline Jarrett's relationship with Wayne Hammon is held harmful but that the effect of her unmarried status in that relationship is dangerous *by example;* that at some future time, if at all, the children may also decline to adopt the policy-preferred status of marriage as defined by the Supreme Court of Illinois.

The Supreme Court of Illinois has thus used the children and the child custody forum to punish Jacqueline Jarrett by taking away her children, in the name of protecting what it perceives to be the best interests of the institution of marriage.

2. The Equal Protection Violation

The Supreme Court of Illinois has used the Jarrett children in this custody matter to single out for punishment a certain class of parental custodians, without any showing in reason or evidence that the unmarried status of Jacqueline Jarrett to Wayne Hammon is harmful to the children. The *Jarrett* decision makes this isolated factor controlling in her case whereas toward other custodial

parents, particularly those who fornicate on a non-resident basis, no other single factor would, in itself be determinative of the child's best interests.

The Illinois Marriage and Dissolution of Marriage Act, which controls this cause, specifically provides in section 602 that "the court shall not consider conduct of a present or proposed custodian that does not affect his relationship with the child." This section has been applied differently to the *Jarrett* class of custodian. In determining custody "in accordance with the best interest of the child," section 610 mandates that "the court shall retain the [present custodian] unless . . . the child's present environment endangers seriously his physical, mental, moral or emotional health. . . ." Contrary to this mandate of the Illinois Legislature, the Court has held that although tangible evidence of present harm to the children in this case is lacking, a showing of present harm is not required here. The mere *fact* of this particular kind of custodial relationship is, in itself, held proof of harm to the children in this class of cases. Although any custodial status, behavior or belief may raise the *question* of detrimental effect on the children, the status of relationship and conduct itself is not simultaneously and irrebuttably its own "proof" of serious detrimental effect. All other custodial conduct over which custodial rights have been challenged have required, since *Stanley* v. *Illinois* and until the instant case, a positive showing and rational connection between the custodial status and the particular effect of that status on the parent-child relationship.

An evidentiary nexus between Jacqueline Jarrrett's relationship and harm or "potential future harm" to the children has not been found or required for this class of unmarried custodial parents according to the Supreme Court of Illinois. In the absence of any evidence to support a finding of harm, the Court was forced to, and in fact did rely upon a conclusive presumption. This presumption not only affects Jacqueline Jarrett, but all those parents similarly situated. For this class of parents, and only this class, it is unnecessary to produce evidence to show that the environment in which the children are being raised is threatening to the child's physical, mental, moral and emotional health. The *Jarrett* Court has failed to establish any nexus between this differential treatment of Jacqueline's class and the best interests of the child. It is this differential treatment which petitioner here contends fails to meet the rational relationship test of the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I.

The decision and opinion of the Supreme Court of Illinois established an irrebutable presumption by terminating the custodial rights of Jaqueline Jarett and thus violated her constitutional rights to Due Process and Equal Protection of the Laws under the 14th Amendment.

A. The Due Process Violation

It is well-established that a parent's relationship with his or her children is one of the liberties to which due process must be accorded. *Quilloin* v. *Walcott,* 434 U.S. 246, 255 (1978). It is equally well-established that irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fourteenth Amendment. *Vlandis* v. *Kline,* 412 U.S. 441 (1973). Accordingly, in those situations where a conclusive presumption has been employed to impair or affect child-rearing and parental rights, this Court has never hesitated to strike down the particular statute or presumption involved. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

In *Jarrett* v. *Jarrett,* the Supreme Court of Illinois has made a radical departure from the constitutional safeguards which were so vigorously protected in *Stanley* and *LaFleur.* The *Jarrett* decision patently creates an irrebuttable and conclusive presumption of future harm to the children caused by the unmarried status itself. Although the majority of the Court attempted to rationalize its ruling by referring to the "manifest weight"

rule, even a cursory review of the Court's decision clearly demonstrates the fact that the *Jarrett* case creates a conclusive presumption which is contrary to and in direct violation of Jacqueline's constitutional rights heretofore recognized and safeguarded by this Court. Justice Moran, in his dissenting opinion cut through the facade when he stated that the majority's ruling is *"based on a conclusive presumption* that harm to the Jarrett children stemmed from Jacqueline's living arrangement. In this case not one scintilla of actual or statistical evidence of harm or danger to the children has been presented." (App. 20a; emphasis added).

In its original slip opinion, the majority expressly stated that its decision was founded upon such a presumption: ". . . the open and continuing co-habitation of the custodial parent with a member of the opposite sex justified the change in custody *in the absence of any tangible evidence of contemporaneous adverse affect on the children.*" (App. 5a; emphasis added). It was only after Jacqueline presented her petition for rehearing, in which she vehemently urged her constitutional rights, that the majority amended the opinion to include a reference to the "manifest weight" of the evidence.

The fact cannot be ignored that the uncontroverted and undisputed evidence clearly demonstrates that Jacqueline is a kind, affectionate mother who takes excellent care of her children. Not one shred of evidence was produced to show that the Jarrett children were unhappy, unstable, neglected, upset or confused. Nor was it shown that the children have been, or are likely to be, subject to scorn or scandal in the community. No evidence was produced to show that the children have or

might adopt their mother's outlook on marriage. In fact, as noted by Justice Moran, the findings of record point much more convincingly to the contrary.

It is apparent, therefore, that in order to reach the decision that it did, the Supreme Court of Illinois was required to rely upon predictions, guess, speculation, conjecture and presumptions of what "might" or "could" happen in the future without any evidence that such events were even "likely" to occur.

The fact that a hearing was held in the trial court does not save the present holding or the trial court's ruling from attack under the Due Process Clause, particularly where the hearing was not a "meaningful one" and the result was foreclosed from the start. *Bell* v. *Burson,* 402 U.S. 535 (1971). As Justice Moran noted in his dissent, such a constitutional infirmity "is at odds with the principle of *Stanley* v. *Illinois,* 405 U.S. 645 (1972). . . . A hearing at which custody is determined on the basis of the conclusive presumption sanctioned by the majority amounts to no hearing at all." 400 N.E. 2d at 427. Due to the ultimate fact at issue being decided *a priori* by presumtion, no meaningful hearing was held. This amounts to a taking away of Jacqueline's present right to continued custody, based solely upon an adjudication of a future moral harm. Such a presumption must not be permitted as a substitute for proof.

As stated by Justice Moran, ". . . [A]ll of the evidence of record, *as related by the majority,* indicates that under Jacqueline's custodianship the children's welfare and needs were met." (App. 20a). (emphasis added). Joining with Justice Moran, Chief Justice Goldenhersh stated, "This record shows clearly that the children

were healthy, well-adjusted, and well cared for, and it should be noted that both the circuit and appellate courts made no finding that plaintiff was an unfit mother." (App. 11a). The "manifest weight" of the evidence referred to by the majority in its amended opinion was, in actuality, a presumption. A presumption of "potential future harm," irrebuttable by the evidence produced at the trial court of Jacqueline's fitness, stability, love and proper care. The "potential future harm" in this case is nothing other than the court's speculation *sua sponte* that the children may someday adopt the life-style of their mother. (App. 17a). Indeed, the majority opinion is substantially devoted to consideration of Jacqueline's relationship with Wayne Hammon and what the Court itself perceives to be the effect of that relationship on the institution of marriage. However, it was not until page seven of the eight-page majority opinion, that the court turned to the "manifest weight of the evidence" when referring to the detrimental effect of Jacqueline's non-marital status. As shown by the following excerpt, the "manifest weight" of the evidence was in actuality the Court's own prediction of what "might" happen:

> "It is difficult to predict what psychological effects or problems *may* later develop from the childrens' efforts to overcome the disparity between their concepts of propriety and their mother's conduct. . . . If the Jarrett children remain, they *might well* be compelled to explain Hammon's presence to their friends and *perhaps* to endure their taunts and jibes." (App. 10a; emphasis added).

What "may", "perhaps", "might", or "could" happen at some future time, without any evidence of a nexus between Jacqueline's non-marital status and the effect of

said relationship on her children, is nothing more than a speculative, conclusive presumption.

The Supreme Court of Illinois, resort to and reliance upon this type of a presumption is precisely the type of reasoning condemned in *Stanley* v. *Illinois,* 405 U.S. 645 (1972). In *Stanley,* the unwed father of three children was denied custody after the death of the natural mother with whom he had lived intermittently for eighteen years. The statute involved in *Stanley* was held to be unconstitutional since it contained an irrebuttable presumption that unmarried fathers are unfit to raise their children. The inherent flaw in the statute was clearly explained by this Court in the following manner:

> "Procedure by presumption is always cheaper and easier than individualized determination, but where, as here, procedure forecloses the determinative issues of competence and care when it explicitly disdains present realities in deference to past formalities, it needlessly runs the risk of running roughshod over the important interests of both parents and child. It therefore cannot stand." *Stanley* v. *Illinois,* 405 U.S. at 656, 657 (1972).

Certainly it would be easier, cheaper and more convenient to presume that such a non-marital status would or could have an adverse effect on the children without requiring the parties to present any evidence in support of that conclusion. But as this Court noted in *Stanley,* the important interests of both parents and children are protected under the Due Process Clause and it is unacceptable for the Court to rely on a presumption of harm "solely because it is more convenient to presume than to prove." 405 U.S, at 658,

The petitioner here contends that what the Illinois Court has referred to as a "troublesome relationship," (App. 10a) as it affects the children, is capable of reasonable proof based on evidence. It is not necessary, or desirable, for the sake of the children to rely on speculative presumptions of what may happen at some indefinite time in the future. Especially, disconcerting is the Illinois court's assumption that petitioner's non-marital status—in fact, a living arrangement—"probably affects the children's mental and emotional health adversely as well." (App. 9a). Certainly, we need not resort to speculative assumptions to find legally admissible and convincing evidence of the mental and emotional health of the children. No change of custody should take place based upon an adjudication of what the Court perceives to be a "future moral harm," which has not occurred and which may, in fact, never occur. Evidence of stability and commitment, love and support, can be found, as they have been found in this case. Doubtless, evidence to the contrary is equally susceptible of proof. Let such evidence and not presumptions be the standard of proof when children are to be taken by a custody modification.

The use of a presumption in this instance to determine the best interests and welfare of the children is contrary to this Court's holding in *Stanley*:

> ". . . where the very nature of due process negates any concept of inflexible procedures universally appicable to any imaginable situation. What procedures Due Process may require under any set of circumstances must begin with the determination of the precise nature of the governmental function involved, as well as the private interest that has been affected." 405 U.S. 645 at 650.

> "Nor has the law refused to recognize those family relationships unlegitimized by marriage ceremonies . . . . [F]amilial bonds in such cases were often as warm, enduring and important as those arising within a more formally organized family unit. 405 U.S. at 651, 652.
>
> "It may be as the state insists, that most (fathers of illegitimate children) are unsuitable and neglectful parents. It may also be that Stanley is such a parent, and that his children should be placed in other hands. But all unmarried fathers (of illegitimate children) are not in this category. 405 U.S. at 654 . . . (The statute) insists on presuming rather than proving Stanley's unfitness, solely because it is more convenient to presume than to prove. Under the Due Process clause, the advantage is insufficient." 405 U.S. at 658.

It was the basic premise of the State of Illinois in *Stanley* that a status defined as marriage signified the parents' willingness to work together in caring for the child by entering into a marriage contract; and that a non-marital status, on the other hand, was presumed to signify a parent's unwillingness to care for children. The state's argument in *Stanley* has a familiar ring to respondent's argument that Jacqueline Jarrett, by her unmarried status, created an environment which presumptively may harm her children in the future, regardless of the absence of present harm.

This presumption is in fact irrebuttable in this particular case since the evidence, uncontroverted and undisputed either by respondent or the Supreme Court of Illinois, shows that Jacqueline Jarrett is a kind, affection mother who takes good care of the children. (400 N.E. 2d at 426, 427). Thus, the rationale of the *Jarrett* decision falls squarely within the Due Process prohibitions outlined in *Vlandis* v. *Klein,* 425 U.S. 411 (1973); *United States Department of Agriculture* v. *Murray,* 413

U.S. 508 (1973); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Turner* v. *Department of Employment Security,* 423 U.S. 44 (1975); and *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

It is also significant to note that the opinion of the Supreme Court of Illinois in *Jarrett* is directly contrary to and indistinguishable from a line of state court decisions in which it was held that the resolution of child custody questions must be based upon evidence rather than presumptions. Jurisdictions considering this issue have likewise refused to resort to the use of an irrebuttable presumption in order to establish a nexus between the parents' living arrangement and harm to the children. In *S.* v. *J.,* 267 N.Y.S.2d 405 (1975), it was held that cohabitation between an unmarried male and female without the benefit of marriage "*is not per se evil or one of immorality.*" The court explained that the resolution of custody questions "should preferably be placed upon more (conductive) considerations determinative of the best welfare of the child. Change of residence and surroundings without circumstances of dire necessity and immense peril should be avoided."

The same conclusion was reached by the Ohio Supreme Court in *In re: Burrell,* 58 Ohio St. 2d 37, 388 N.E. 2d 38 (1979), which involved a situation where the mother was living with a man not her husband. In refusing to uphold a change of custody based upon the mother's living arrangement, the Court held:

> "The conduct of the parent is relevant solely insofar as that parent's conduct forms part of the environment of the child. As part of the child's environment, such conduct is only significant if it can be demonstrated to have an adverse impact upon the child. Here such is not the case." *In re*: *Burrell* 58 Ohio St. 2d 37, 388 N.E. 2d 38, (Ohio Sup. Ct., 1979).

In re: *Marriage of Walter,* 27 Or. App. 721, concerned a similar question. The Oregon court refused to resort to the use of a presumption, explaining:

> "While cohabitation may in many circumstances be injurious to the welfare of the child, we cannot say that in every circumstance conceivable or otherwise that cohabitation in any form would have such an effect. Examining the record, there is no evidence which indicates that the condition placed upon the award of custody is necessary to protect the children. The court should make its decision in light of the actual rather than a speculative situation."

S. v. *J., Burrell* and *Walter* are all consistent with and follow this Court's decision in *Stanley* v. *Illinois. Jarrett* v. *Jarrett,* however, in explicitly rejecting the application of *Stanley,* has ignored and seriously threatened the constitutional safeguards which this Court, and the courts of our sister states, have so carefully strived to protect.

Due Process requires the elimination of conclusive presumptions when deciding important issues such as the best interests and welfare of the children. Prior to *Jarrett,* it was universally accepted that the burden is, and always has been, on the movant seeking a change of custody to show that the behavior complained of adversely affects the child, and affects the child so seriously that removal from the dangerous environment is in the child's best interests. As noted by Chief Justice Goldenhersh:

> ". . . in order to modify or amend an award of custody, the evidence must show that the parent to whom custody of the children was originally awarded is unfit to retain custody, or that a change of condi-

tions make a change of custody in their best interests. This record fails to show either." (App. 12a).

Justice Moran wholeheartedly agreed with this analysis, stating that ". . . only on the basis of fact can there be a finding that a change in circumstances has occurred and that modification of the prior custody judgment is necessary to serve the best interest of the children." (ILL.REV. STAT. ch. 40, sec. 610(b) (1977)). ". . . Jacqueline should not be deprived of the children in the absence of evidence that a change is necessary to serve the best interests of the child." (App. 20a).

The Supreme Court of Illinois in *Jarrett* has prohibited unmarried parents from living together by depriving fit and proper parents the custody of their children without requiring evidence of harm to the children. Instead, by means of a conclusive presumption, or *per se* rule, based upon an adjudication of future moral harm not presently in existence, a change of custody is presumed to be in the best interests of the children. A presumption of this nature focuses upon the conduct of the parent, rather than the best interests of the child. As Justice Moran explained, "[t]his court is not to consider conduct of a custodian if that conduct does not affect [the] relationship to the child." (Ill. Rev. Stat. ch. 40, sec. 602(b) (1977)) ". . . Instead of focusing solely on the best interest of the children . . . the majority has utilized child custody as a vehicle to punish Jacqueline for her "misconduct." (App. 20a).

This action is not to determine the best interests of the institution of marriage, or whether petitioner, all by herself, has endangered the institution of marriage.

This cause arose as a modification of custody proceeding and is to determine whether a compelling showing has been made that Jacqueline's children have been harmed or harm is so imminent that they must be taken from her. To require petitioner to marry, if she is to keep custody of her natural children, is tantamount to marriage by edict or judicial decree. There is no public policy or compelling state interest in the institution of marriage which outweighs the fundamental right of a person to marry or not to marry. *Loving* v. *Virginia,* 388 U.S. 1 (1967).

To decide important rights of parent and child on the basis of an adjudication of a future moral harm is not only patently unjust and unnecessary but is a clear violation of the Due Process clause of the Fourteenth Amendment. No state interest in the institution of marriage is so compelling as to constitute a basis for adjudication of such rights, particularly where there is not one scintilla of evidence showing that the environment is "dangerous" or that the children may suffer harm "at some future time" and likewise forego formal marriage.

As Chief Justice Goldenhersh stated:

> ". . . it should be noted that both the circuit and appellate courts made no finding that plaintiff was an unfit mother. The majority, too, makes no such finding and based its decision on a nebulous concept of injury to the children's 'moral well-being and development.' (78 Ill.2d at 347, 36 Ill.Dec. at 4, 400 N.E.2d at 424.) I question that any competent sociologist would attribute the increase to 'live in' unmarried couples to parental example. (App. 11a).

Blanket subjective presumptions simply will not work in the context of increasingly unique and complex cir-

cumstances present in custody determinations. Every child's interests in such matters deserves more careful scrutiny than blanket presumptions will allow.

B. The Equal Protection Violation

The overall impact of the *Jarrett* decision is potentially overwhelming since the Supreme Court of Illinois has effectively established a unique classification of unmarried parents who reside with members of the opposite sex, and has arbitrarily discriminated against Jacqueline Jarrett and all those parents similarly situated by denying them the equal protection of the laws. In its personalized, subjective judgment seeking to uphold and strengthen the institution of formal marriage, but without any objective evidence and study, the Court has plunged in "running roughshod" (*Stanley* v. *Illinois*, 405 U.S. 645 at 656) over the important rights of 1.1 million similarly situated parents and their children. *U.S. Bureau of Census, Current Population Report*, p. 20, No. 23, "Marital Status and Living Arrangements" March 1977. Although the Illinois Supreme Court dismissed the Census statistics as unpersuasive, the purpose in citing these figures was to demonstrate a material and existing social phenomenon in which the equal protection rights of more and more people are being threatened everyday. According to the Illinois Court's majority holding, respondent, Walter Jarrett, and all other ex-custodians similarly situated, need only show that the present custodian is living with a member of the opposite sex in order to warrant a transfer of custody. With such a rule, the likelihood of abuse is immense. Moreover, such a classification totally disregards the principles formulated by the Illinois Legislature in the recently enacted Marriage and Dissolution of Marriage Act, which provides in pertinent part as follows;

Section 510: Modification and Termination of Provisions for Maintenance, Support and Property Disposition.

(b) The obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis. . . .

Section 602: Best Interests of the Child.

(a) The Court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors, including 1) the wishes of the child's parent or parents as to his custody; 2) the wishes of the child as to his custodian; 3) the interaction and interrelationship of the child with his parents or parent, his siblings and any other person who may significantly affect the child's best interests; 4) the child's adjustment to his home, school and community; and 5) the mental and physical health of all individuals involved.

(b) The Court shall not consider conduct of a present or proposed custodian that does not affect his relationship with the child. . . .

Section 610. Modification.

(b) The Court shall not modify a prior custody judgment unless it finds on the basis of the facts that have arisen since the prior judgment or have been unknown to the Court at the time of entry of the original judgment that a change has occurred in circumstances of the child or his custodian and that a modification is necessary to serve the best interests of the child. In applying these standards the Court shall retain the custodian appointed pursuant to the prior judgment unless . . . (3) the child's present environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change in environment is outweighed by the benefits to him. . . ."

Ill. Rev. Stat., ch. 40, pars. 510, 602, 610 (1977).

Without justification in law or fact, the Illinois court has singled out a sub-class of parents whose status, *per se,* is a controlling justification for termination of their parental rights. In other circumstances, the existence of such a relationship or conduct, would not and could not be controlling. It is this differential treatment which fails to meet the rational relationship test of the Equal Protection clause of the Fourteenth Amendment. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). There is simply no nexus between the uniquely disabling class characteristics established by the Illinois Court's opinion, and all other possible types of custodial conduct. Furthermore, no nexus exists between this class of unmarried parents and the presumed harmful effect on their children. For this, and only this notorious and dangerous sub-class of custodian, the Supreme Court of Illinois "will not wait" as it must in all other situations to reach a decision that is based upon "facts that have arisen", ILL.REV.STAT., ch. 40, par. 610(a) (1977), or evidence that the "*present environment endangers seriously*" the child. ILL.REV.STAT. ch. 40, par. 610(b) (1977) (emphasis added). The Illinois Court has decided that it will not wait for actual harm where this, and only this, particular type of custodial relationship exists regardless of the other facts showing parental fitness, love, care and the well-being of the children.

The finding by the Supreme Court of Illinois that Jacqueline Jarrett violated a dormant statute relating to fornication places Jacqueline and all those parents similarly situated in a unique and disabling class which is not entitled to the constitutional safeguards that other parents enjoy. Under the Criminal Code of Illinois, prosecution and conviction of an offense, albeit a Class B misdemea-

nor, is within the sole jurisdiction of the People of the State of Illinois, and the Supreme Court of the State is without jurisdiction to decide *ex parte* that Jacqueline or anyone else similarly situated is in fact guilty of a crime. Chief Justice Goldenhersh defined the issue:

> "As a legal matter, simply stated, the majority has held that on the basis of her presumptive guilt of fornication, a Class B misdemeanor, plaintiff, although not declared to be an unfit mother, has forfeited the right to have the custody of her children." (App. 12a).

If it were the manifest will of the People of the State of Illinois that Jacqueline should be charged, tried and found guilty under ILL.REV.STAT., ch. 38, sec. 11-8 (1977), then the penalty would not exceed a $200.00 fine or 6 months imprisonment. The forfeiture of the right to custody of her children is not a penalty for violation of this statute. Such a punishment is not set by the legislature, and, as applied to Jacqueline Jarrett, is *ex post facto* in nature, and penal in result, being used to punish her status as a single parent living with a person of the opposite sex. Moreover, Jacqueline takes exception to the application of the Criminal Code of 1961 as the controlling basis of custody modification under the Illinois Marriage and Dissolution of Marriage Act of 1977.

Justice Moran took issue with the majority's reliance on this criminal statute in determination of child custody: ". . . [T]he majority's finding of a violation of the seldom-enforced fornication statute effectively foreclosed any further consideration of the custody issue." (App. 20a) As the dissenting opinions in *Jarrett* capably demonstrate, the

effect of such a determination is to punish violators of Chapter 38, Section 11-8, with the loss of their children, even "in the absence of tangible evidence of contemporaneous adverse effect on the children," and even though the custodian is not otherwise declared to be unfit. Any conceivable notion of equal protection of law, no matter how basic or narrowly defined, militates against such a rule. To define such conduct as criminal and, therefore, contrary to public policy constitutes two *a prior* presumptions: (1) that all people occupying this status are immoral; and (2) that this immorality is harmful to the children, if not presently, then in the future. These presumptions are, in effect, contrary to the best interests of the children. By presuming harm without proof, and precluding evidence of positive effect on the children, the presumptions created as irrebuttable. These presumptions are applied to this one class of custodial parents, and to the exclusion of all other custodians.

In arriving at its decision the Supreme Court of Illinois stated, "[i]t is in our judgment, clear that her conduct offends prevailing public policy." (App. 7a) Jacqueline respectfully submits that it is the judgment of the People of the State of Illinois alone that may determine whether or not Jacqueline's conduct offends prevailing public policy. The Supreme Court of Illinois effectively found Jacqueline guilty of criminal conduct. This "criminality" was held offensive to "prevailing public policy." As pointed out by Chief Justice Goldenhersh:

> The fragility of its conclusion concerning "prevailing public policy' is demonstrated by the majority's reliance on cases decided by this court in 1852 (*Searls* v. *People,* 13 Ill. 597) and 1902 (*Lyman* v. *People,* 198 Ill. 544, 64 N.E. 974), and an appellate court

> decision (*People* v. *Potter* (1943), 319 Ill. App. 409, 49 N.E. 2d 307) which rather than 'prevailing public policy,' more clearly indicates the prejudice extant in that period against interracial sexual relations. (App. 11a)

Public policy, as it relates to child custody proceedings, is ascertainable by reference to the Illinois Marriage and Dissolution of Marriage Act where the focus of the legislature has been to regulate, rather than condemn such a status. Reference to Sections 510(b), 610 and 602(b) refutes such a status as presumptively illegal or immoral, and reveals an arbitrary and invidiously discriminating application in the *Jarrett* decision.

Such relationships are referred to in Section 510(b), *supra,* relative to modification of maintenance but not in Section 610, *supra,* relative to modification of custody. The absence of such a reference in Section 610 is explained by reference to Section 602(b), *supra*: "(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." The inclusion of custodial conduct as a relevant factor in Section 510(b) regarding maintenance, and the exclusion of custodial conduct in Section 610(b) by the substitution of 602(b) regarding custody, is a clear statement of legislative intent. The conduct of a custodial parent is not to be given presumptive or negative application in a custody proceeding; yet the Supreme Court of Illinois, in determining custody modifications involving this particular class of individuals—namely single parents living with a person of the opposite gender—defines such a status and the conduct therein as the basis for applying an irrebuttable presumption that the relationship or status of the parent presumably and conclusively "endangers seriously the physical, mental, moral or emotional health" of the child—if not now, then in the future.

As a direct result of the suspect construction and selective application of these statutory custodial provisions by the Supreme Court of Illinois, the defined members of this sub-class of unmarried parents are arbitrarily discriminated against by the taking of their children. This loss of their children is accomplished by an irrebutable and conclusive presumption that such a relationship "endangers seriously the physical, mental, moral or emotional health of their children" and "the harm likely to be caused by a change in environment is outweighed by the benefits" to their children. This judicially created presumption operates in direct contradiction to the criteria and standards set forth in Sections 602 and 610 to determine the "best interest" of the child. This presumption ignores the statutory mandate is Section 602(b), fails to conduct an evidentiary hearing regarding the five "relevant factors" in Section 602(a), and decides without proof of harm or evidence of "relevant factors" the best interests of the child, contrary to Sections 602(a) and 610(b). This presumption rears its ugly head in defiance of these statutory mandates only when an unmarried parent residing with a person of the opposite sex is faced with the loss of a child in a custody modification proceeding initiated by a non-custodial former spouse. In any other custody proceeding involving any other litigant, the statutory mandates of Section 602 and 610 are applied, and custody is awarded based on evidence of the "best interest of the child", rather than presumption.

The Appellate Court in *Jarrett* was correct in its decision to reject rigid classifications and to follow instead the consistent, yet flexible line of Illinois case authority as harmonized into and with the mandate of the Illinois Legislature in the New Marriage and Dissolution of

Marriage Act, Section 602 and 610. These sections set forth criteria to be considered and standards to be appiled in resolving modification of custody disputes. At the same time, the Legislature established a built-in safeguard to protect the constitutional rights of the litigants. In modification proceedings the "moral" health of the children is merely *one* factor among several to be considered in deciding whether a change of custody is in the best interests of the child. Under no circumstances was it intended to be the only, or the controlling, factor. However, for those parents who fall within the *Jarrett* class, and only those parents, no nexus between the parents nonmarital status and harm to the children need be evidenced. The Appellate Court correctly focused on the children and on any reasonable inferences of negative effects on them as the proper basis for the modification proceeding. The custodial parent's conduct or lifestyle may well be an integral part of the children's environment. However, the issue is not only whether the parent's conduct and beliefs affect the child (Section 602), but whether the party seeking modification can *show* that the effects are negative, and not just perhaps or possibly so, but substantially and immediately so, such that the disadvantage of a rupture of the whole familiar environment of the child is outweighed by the advantages in a change in custody. (Section 610). Such a showing was clearly not made in this case.

A brief review of the applicable Illinois case law clearly demonstrates that in all matters concerning the custody of children, the paramount issue is the child's welfare. The fact of changed conditions in itself is not sufficient to warrant modification. *Nye* v. *Nye,* 411 Ill. 408, 416, 105 N.E.2d 300 (1952); *Eggemeyer* v. *Eggemeyer,* 86 Ill. App.

2d 224, 231, 229 N.E. 2d 144 (1967); *Jacobs* v. *Jacobs,* 25 Ill. App. 3d 175, 178, 323 N.E. 2d 21 (1974); *Arden* v. *Arden,* 25 Ill. App. 2d 181, 186, 166 N.E. 2d 111 (1960); *Garland* v. *Garland,* 19 Ill. App. 3d 951, 954, 312 N.E. 2d 811 (1974). In determining whether there had been changed conditions, the Court must keep in view primarily the welfare of the child. The custody of the child is not awarded for the purpose of gratifying feelings of either parent or with any idea of punishing or rewarding either parent. *Maupin* v. *Maupin,* 339 Ill. App. 484, 489, 90 N.E. 2d 234 (1950); *Wade* v. *Wade,* 345 Ill. App. 170, 180, 102 N.E. 2d 356. Every presumption is indulged in favor of the validity of the original judgment and if its provisions are to be changed, the burden of proof is on the moving party to show why a change should be made. *Jacobs* 25 Ill App.3d at 170; *Eggemeyer* 86 Ill. App.2d at 230; *Abbott* v. *Abbott,* 40 Ill. App. 3d 348, 350, 352 N.E. 2d 404 (1976). Since the children and the parents are entitled to a certain degree of finality and conclusiveness when an order of custody is entered *Collins* v. *Collins,* 120 Ill. App. 2d 125, 128, 256 N.E. 2d 108 (1970), persons seeking a change must positively demonstrate that the change is necessary for the welfare of the children. *King* v. *Vancil,* 34 Ill. App. 3d 831, 834, 341 N.E. 2d 65 (1975). The guiding start of all custody cases is the best interests and welfare of the child. *Nye* v. *Nye,* 411 Ill. 408, 416, 105 N.E. 2d 300 (1952).

Permissive presumptions operate to shift the burden to the party against whom the presumption is applied, and such has never been the law in Illinois custody determination. The burden is always on the movant seeking the change. Indeed, if any presumption exists in Illinois custody law, it exists in favor of the original custodian, *In re*: *Harne,* 33 Ill. Dec. 110 (1979). Jacqueline is asking

no more, but certainly no less, than what has been accorded prior custody litigants. A presumption on any fact did not operate against them. It should not operate against her either, in violation of the Equal Protection clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set out above, petitioner Jacqueline Jarrett respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Docket No. 51431—Agenda 23—September 1979.

JACQUELINE JARRETT, Appellee, v. WALTER JARRETT, Appellant.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

On December 6, 1976, Jacqueline Jarrett received a divorce from Walter Jarrett in the circuit court of Cook County on grounds of extreme and repeated mental cruelty. The divorce decree, by agreement, also awarded Jacqueline custody of the three Jarrett children subject to the father's right of visitation at reasonable times. Seven months later, alleging changed conditions, Walter petitioned the circuit court to modify the divorce decree and award him custody of the children. The circuit court granted his petition subject to the mother's right of visitation at reasonable times, but the appellate court reversed (64 Ill. App. 3d 932), and we granted leave to appeal.

During their marriage, Walter and Jacqueline had three daughters, who, at the time of the divorce, were 12, 10 and 7 years old. In addition to custody of the children, the divorce decree also awarded Jacqueline the use of the family home, and child support; Walter received visitation rights at all reasonable times and usually had the children from Saturday evening to Sunday evening. In April 1977, five months after the divorce, Jacqueline informed Walter that she planned to have her boyfriend, Wayne Hammon, move into the family home with her. Walter protested, but Hammon moved in on May 1, 1977. Jacqueline and Hammon thereafter cohabited in the Jarrett home but did not marry.

The children, who were not "overly enthused" when they first learned that Hammon would move into the

family home with them, asked Jacqueline if she intended to marry Hammon, but Jacqueline responded that she did not know. At the modification hearing Jacqueline testified that she did not want to remarry because it was too soon after her divorce; because she did not believe that a marriage license makes a relationship; and because the divorce decree required her to sell the family home within six months after remarriage. She did not want to sell the house because the children did not want to move and she could not afford to do so. Jacqueline explained to the children that some people thought it was wrong for an unmarried man and woman to live together but she thought that what mattered was that they loved each other. Jacqueline testified that she told some neighbors that Hammon would move in with her but that she had not received any adverse comments. Jacqueline further testified that the children seemed to develop an affectionate relationship with Hammon, who played with them, helped them with their homework, and verbally disciplined them. Both Jacqueline and Hammon testified at the hearing that they did not at that time have any plans to marry. In oral argument before this court Jacqueline's counsel conceded that she and Hammon were still living together unmarried.

Walter Jarrett testified that he thought Jacqueline's living arrangements created a moral environment which was not a proper one in which to raise three young girls. He also testified that the children were always clean, healthy, well dressed and well nourished when he picked them up, and that when he talked with his oldest daughter, Kathleen, she did not object to Jacqueline's living arrangement.

The circuit court found that it was "necessary for the moral and spiritual well-being and development" of the children that Walter receive custody. In reversing, the appellate court reasoned that the record did not reveal any negative effects on the children caused by Jacqueline's cohabitation with Hammon, and that the circuit court

had not found Jacqueline unfit. It declined to consider potential future harmful effects of the cohabitation on the children. 64 Ill. App. 3d 932, 937.

Both parties to this litigation have relied on sections 602 and 610 of the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, pars. 602, 610), which provide:

"Sec. 602. Best interest of child.

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child."

"Sec. 610. Modification.

(a) No motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

(b) The court shall not modify a prior custody judgment unless it finds, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the said

judgment, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior judgment unless:

* * *

(3) the child's present environment endangers seriously his physical, mental, moral or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) ***"

We note initially, however, that this appeal from the custody modification order was taken on August 11, 1977, two months before the effective date of the new act, and that the new act expressly provides that prior law shall govern such an appeal (Ill. Rev. Stat. 1977, ch. 40, par. 801(d)). While the sections of the new act governing modification of custody orders require explicit findings (see *In re Custody of Harne* (1979), 77 Ill. 2d 414), we believe those sections in substance codify the prior decisional law, and that our decision in this appeal is not affected by the applicability or nonapplicability of the new act.

The standards applicable to petitions for modification of custody appearing in section 610(b) are substantially those to which Illinois courts have long adhered. In *Nye* v. *Nye* (1952), 411 Ill. 408, 416, this court said that a divorce decree "is *res judicata* as to the facts which existed at the time it was entered" and that "[n]ew conditions must have arisen to warrant the court changing its prior custody determination." Moreover, the guiding principle in custody adjudications is the best interests of the child (411 Ill. 408, 415) and the change in conditions must adversely affect the best interests of the child. (411 Ill. 408, 416). The prior statute also directed the attention of the

court to the interests of the child in custody adjudications. (Sections 13 and 18 of the Divorce Act (Ill. Rev. Stat. 1975, ch. 40, pars. 14, 19), repealed by the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, pars. 101 to 802).) Although prior Illinois decisions did not explicitly articulate the new act's command that no change be made in custody unless the harm inherent in any change in custody is outweighed by the advantages to the child of the new environment, they did recognize that continuity in the child's environment is in itself important. (*Bergan* v. *Bergan* (1976), 42 Ill. App. 3d 740, 743; *Holloway* v. *Holloway* (1973), 10 Ill. App. 3d 662, 665; *Collings* v. *Collings* (1970), 120 Ill. App. 2d 125, 128; *Jenkins* v. *Jenkins* (1967), 81 Ill. App. 2d 67, 72, 74; *Leary* v. *Leary* (1965), 61 Ill. App. 2d 152, 155.) Finally, the commands of sections 602 and 610 of the new act to consider only whether the child's environment endangers his physical, mental, moral and emotional health (Ill. Rev. Stat. 1977, ch. 40, par. 610) and to disregard any conduct of the custodian that does not affect his relationship with the child (Ill. Rev. Stat. 1977, ch. 40, par. 602) reemphasize the principle stated in *Nye* v. *Nye* (1952), 411 Ill. 408, that the focus of custody determinations must be the welfare of the child.

The chief issue before us in this case is whether the open and continuing cohabitation of the custodial parent with a member of the opposite sex justifies a change in custody in the absence of any tangible evidence of contemporaneous adverse effect on the children. Considering the principles previously enunciated, and the statutory provisions, and prior decisions of the courts of this State, we conclude that under the facts in this case the trial court properly transferred custody of the Jarrett children from Jacqueline to Walter Jarrett.

The relevant standards of conduct are expressed in the statutes of this State: Section 11-8 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 11-8) provides that "[a]ny person who cohabits or has sexual intercourse

with another not his spouse commits fornication if the behavior is open and notorious." In *Hewitt* v. *Hewitt* (1979), 77 Ill. 2d 49, 61-62, we emphasized the refusal of the General Assembly in enacting the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, par. 101 *et seq.*) to sanction any nonmarital relationships and its declaration of the purpose to "strengthen and preserve the integrity of marriage and safeguard family relationships" (Ill. Rev. Stat. 1977, ch. 40, par. 102(2)).

Jacqueline argues, however, that her conduct does not affront public morality because such conduct is now widely accepted, and cites 1978 Census Bureau statistics that show 1.1 million households composed of an unmarried man and woman, close to a quarter of which also include at least one child. This is essentially the same argument we rejected last term in *Hewitt* v. *Hewitt* (1979), 77 Ill. 2d 49, and it is equally unpersuasive here. The number of people living in such households forms only a small percentage of the adult population, but more to the point, the statutory interpretation urged upon us by Jacqueline simply nullifies the fornication statute. The logical conclusion of her argument is that the statutory prohibitions are void as to those who believe the proscribed acts are not immoral, or, for one reason or another, need not be heeded. So stated, of course, the argument defeats itself. The rules which our society enacts for the governance of its members are not limited to those who agree with those rules—they are equally binding on the dissenters. The fornication statute and the Illinois Marriage and Dissolution of Marriage Act evidence the relevant moral standards of this State, as declared by our legislature. The open and notorious limitation on the former's prohibitions reflects both a disinclination to criminalize purely private relationships and a recognition that open fornication represents a graver threat to public morality than private violations. Conduct of that nature, when it is open, not only violates the statutorily ex-

pressed moral standards of the State, but also encourages others to violate those standards, and debases public morality. While we agree that the statute does not penalize conduct which is essentially private and discreet (*People* v. *Cessna* (1976), 42 Ill. App. 3d 746, 749), Jacqueline's conduct has been neither, for she has discussed this relationship and her rationalization of it with at least her children, her former husband and her neighbors. It is, in our judgment, clear that her conduct offends prevailing public policy. *Lyman* v. *People* (1902), 198 Ill. 544, 549-50; *Searls* v. *People* (1852), 13 Ill. 597, 598; *People* v. *Potter* (1943), 319 Ill. App. 409, 410-11, 416.

Jacqueline's disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them (see *Stark* v. *Stark* (1973), 13 Ill. App. 3d 35), and could well encourage the children to engage in similar activity in the future. That factor, of course, supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children.

It is true that, as Jacqueline argues, the courts have not denied custody to every parent who has violated the community's moral standards, nor do we now intimate a different rule. Rather than mechanically denying custody in every such instance, the courts of this State appraise the moral example currently provided and the example which may be expected by the parent in the future. We held in *Nye* v. *Nye* (1952), 411 Ill. 408, 415, that past moral indiscretions of a parent are not sufficient grounds for denying custody if the parent's present conduct establishes the improbability of such lapses in the future. This rule focuses the trial court's attention on the moral values which the parent is actually demonstrating to the children.

Since the decision in *Nye*, the appellate courts of this State have repeatedly emphasized this principle, particularly when the children were unaware of their parent's moral indiscretion. (*Hendrickson* v. *Hendrickson* (1977),

49 Ill. App. 3d 160; *Strand* v. *Strand* (1976), 41 Ill. App. 3d 651; *Christensen* v. *Christensen* (1975), 31 Ill. App. 3d 1041; *Huey* v. *Huey* (1975), 25 Ill. App. 3d 20; *Mulvihill* v. *Mulvihill* (1974), 20 Ill. App. 3d 440; *Hahn* v. *Hahn* (1966), 69 Ill. App. 2d 302; *Leary* v. *Leary* (1965), 61 Ill. App. 2d 152; *Jayroe* v. *Jayroe* (1965), 58 Ill. App. 2d 79; *Arden* v. *Arden* (1960), 25 Ill. App. 2d 181; *Wolfrum* v. *Wolfrum* (1955), 5 Ill. App. 2d 471.) At the time of this hearing, however, and even when this case was argued orally to this court, Jacqueline continued to cohabit with Wayne Hammon and had done nothing to indicate that this relationship would not continue in the future. Thus the moral values which Jacqueline currently represents to her children, and those which she may be expected to portray to them in the future, contravene statutorily declared standards of conduct and endanger the children's moral development.

Jacqueline argues, however, that three recent cases—*Burris* v. *Burris* (1979), 70 Ill. App. 3d 503, *In re Marriage of Farris* (1979), 69 Ill. App. 3d 1042, and *Rippon* v. *Rippon* (1978), 64 Ill. App. 3d 465—indicate that the moral indiscretion of a parent is not sufficient ground for denial of custody. In *Rippon* the mother who had committed the indiscretion planned to marry her paramour and there was no indication of future misconduct. *Rippon* therefore falls within the rule set out in *Nye*. Both *Farris* and *Burris* were rendered after, and relied upon, the appellate decisions in this case (64 Ill. App. 3d 932) and in *Hewitt* v. *Hewitt* (1978), 62 Ill. App. 3d 861, both of which we have now reversed.

Jacqueline also argues, and the appellate court agreed (64 Ill. App. 3d 932, 937), that the trial court's decision to grant custody of the children to Walter Jarrett was an improper assertion by the trial judge of his own personal moral beliefs. She further argues that the assertion of moral values in this case, as in *Hewitt* v. *Hewitt* (1979), 77 Ill. 2d 49, is a task more appropriately carried out by the legislature. As pointed out earlier, however, it

is the legislature which has established the standards she has chosen to ignore, and the action of the trial court merely implemented principles which have long been followed in this State.

The mother argues, too, that section 610 of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, par. 610) requires the trial court to refrain from modifying a prior custody decree unless it finds that the children have suffered actual tangible harm. The statute, however, directs the trial court to determine whether "the child's present environment *endangers* seriously his physical, mental, moral or emotional health." (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 40, par. 610(b)(3).) In some cases, particularly those involving physical harm, it may be appropriate for the trial court to determine whether the child is endangered by considering evidence of actual harm. In cases such as this one, however, such a narrow interpretation of the statute would defeat its purpose. At the time of the hearing the three Jarrett children, who were then 12, 10 and 7 years old, were obviously incapable of emulating their mother's moral indiscretions. To wait until later years to determine whether Jacqueline had inculcated her moral values in the children would be to await a demonstration that the very harm which the statute seeks to avoid had occurred. Measures to safeguard the moral well-being of children, whose lives have already been disrupted by the divorce of their parents, cannot have been intended to be delayed until there are tangible manifestations of damage to their character.

While our comments have focused upon the moral hazards, we are not convinced that open cohabitation does not also affect the mental and emotional health of the children. Jacqueline's testimony at the hearing indicated that when her children originally learned that Wayne Hammon would move in with them, they initially expected that she would marry him. It is difficult to predict what psychological effects or problems may later develop

from their efforts to overcome the disparity between their concepts of propriety and their mother's conduct. (*Gehn* v. *Gehn* (1977), 51 Ill. App. 3d 946, 949.) Nor will their attempts to adjust to this new environment occur in a vacuum. Jacqueline's domestic arrangements are known to her neighbors and their children; testimony at the hearing indicated that Wayne Hammon played with the Jarrett children and their friends at the Jarrett home and also engaged in other activities with them. If the Jarrett children remained in that situation, they might well be compelled to try to explain Hammon's presence to their friends and, perhaps, to endure their taunts and jibes. In a case such as this the trial judge must also weigh these imponderables, and he is not limited to examining the children for current physical manifestations of emotional or mental difficulties.

Finally, we do not believe that the United States Supreme Court's opinion in *Stanley* v. *Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208, requires a different result. In *Stanley* the Supreme Court found that Illinois statutes created a presumption that an unwed father is unfit to exercise custody over his children. The court held that depriving an unwed father of his illegitimate children without a prior hearing to determine his actual rather than presumptive unfitness, when the State accords that protection to other parents, deprives him of equal protection of the law.

The case before us is fundamentally different. The trial court did not presume that Jacqueline was not an adequate parent, as the juvenile court in effect did in *Stanley*. Rather the trial court recognized that the affection and care of a parent do not alone assure the welfare of the child if other conduct of the parent threatens the child's moral development. Since the evidence indicated that Jacqueline had not terminated the troublesome relationship and would probably continue it in the future, the trial court properly transferred custody to Walter Jarrett, an equally caring and affectionate parent whose

conduct did not contravene the standards established by the General Assembly and earlier judicial decisions.

Accordingly, we reverse the judgment of the appellate court and affirm the judgment of the circuit court of Cook County.

Appellate court reversed;
circuit court affirmed.

MR. CHIEF JUSTICE GOLDENHERSH, with whom MR. JUSTICE MORAN joins, dissenting:

The majority states, "The chief issue before us in this case is whether the open and continuing cohabitation of the custodial parent with a member of the opposite sex justifies a change in custody in the absence of any tangible evidence of contemporaneous adverse effect on the children." (Slip op. at 4.) An examination of the opinion fails to reveal any other issue, and the effect of the decision is that the plaintiff's cohabitation with Hammon *per se* was sufficient grounds for changing the custody order previously entered. This record shows clearly that the children were healthy, well adjusted, and well cared for, and it should be noted that both the circuit and appellate courts made no finding that plaintiff was an unfit mother. The majority, too, makes no such finding and based its decision on a nebulous concept of injury to the children's "moral well-being and development." (Slip op. at 5.) I question that any competent sociologist would attribute the increase of "live in" unmarried couples to parental example.

The fragility of its conclusion concerning "prevailing public policy" is demonstrated by the majority's reliance on cases decided by this court in 1852 (*Searls* v. *People*, 13 Ill. 597) and 1902 (*Lyman* v. *People*, 198 Ill. 544), and an appellate court decision (*People* v. *Potter* (1943), 319 Ill. App. 409) which, rather than "prevailing public policy," more clearly indicates the prejudice extant in that period against interracial sexual relations.

As the appellate court pointed out, the courts should not impose the personal preferences and standards of the judiciary in the decision of this case. Courts are uniquely equipped to decide legal issues and are well advised to leave to the theologians the question of the morality of the living arangement into which the plaintiff had entered.

As a legal matter, simply stated, the majority has held that on the basis of her presumptive guilt of fornication, a Class B misdemeanor, plaintiff, although not declared to be an unfit mother, has forfeited the right to have the custody of her children. This finding flies in the face of the established rule that, in order to modify or amend an award of custody, the evidence must show that the parent to whom custody of the children was originally awarded is unfit to retain custody, or that a change of conditions makes a change of custody in their best interests. This record fails to show either. Mr. Justice Moran and I dissent and would affirm the decision of the appellate court.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
Springfield, Ill. 62706
(217) 782-2035

February 1, 1980

Mr. Michael H. Minton
Attorney at Law
415 W. Golf Rd., Suite 25-27
Arlington Heights, IL 60005

No. 51431 - Jacqueline Jarrett, appellee, vs. Walter Jarrett, appellant. Appeal, Appellate Court, First District.

The Supreme Court today denied the petition for rehearing in the above entitled cause. A copy of pages 1, 4, 5 and 8 of the opinion as modified upon such denial are enclosed.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

—1—

Docket No. 51431—Agenda 23—September 1979.

JACQUELINE JARRETT, Appellee, v. WALTER JARRETT, Appellant.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

On December 6, 1976, Jacqueline Jarrett received a divorce from Walter Jarrett in the circuit court of Cook County on grounds of extreme and repeated mental cruel-

ty. The divorce decree, by agreement, also awarded Jacqueline custody of the three Jarrett children subject to the father's right of visitation at reasonable times. Seven months later, alleging changed conditions, Walter petitioned the circuit court to modify the divorce decree and award him custody of the children. The circuit court granted his petition subject to the mother's right of visitation at reasonable times, but a majority of the appellate court reversed (64 Ill. App. 3d 932), and we granted leave to appeal.

During their marriage, Walter and Jacqueline had three daughters, who, at the time of the divorce, were 12, 10 and 7 years old. In addition to custody of the children, the divorce decree also awarded Jacqueline the use of the family home, and child support; Walter received visitation rights at all reasonable times and usually had the children from Saturday evening to Sunday evening. In April 1977, five months after the divorce, Jacqueline informed Walter that she planned to have her boyfriend, Wayne Hammon, move into the family home with her. Walter protested, but Hammon moved in on May 1, 1977. Jacqueline and Hammon thereafter cohabited in the Jarrett home but did not marry.

The children, who were not "overly enthused" when they first learned that Hammon would move into the family home with them, asked Jacqueline if she intended to marry Hammon, but Jacqueline responded that she did not know. At the modification hearing Jacqueline testified that she did not want to remarry because it was too soon after her divorce; because she did not believe that a marriage license makes a relationship; and because the divorce decree required her to sell the family home within six months after remarriage. She did not want to sell the house because the children did not want to move and she could not afford to do so. Jacqueline explained to the children that some people thought it was wrong for an unmarried man and woman to live together but she

thought that what mattered was that they loved each other. Jacqueline testified that she told some neighbors that Hammon would move in with her but that she had not received any adverse comments. Jacqueline further testified that the children seemed to develop an affec-

3d 740, 743; *Holloway* v. *Holloway* (1973), 10 Ill. App. 3d 662, 665; *Collings* v. *Collings* (1970), 120 Ill. App. 2d 125, 128; *Jenkins* v. *Jenkins* (1967), 81 Ill. App. 2d 67, 72, 74; *Leary* v. *Leary* (1965), 61 Ill. App. 2d 152, 155.) Finally, the commands of sections 602 and 610 of the new act to consider only whether the child's environment endangers his physical, mental, moral and emotional health (Ill. Rev. Stat. 1977, ch. 40, par. 610) and to disregard any conduct of the custodian that does not affect his relationship with the child (Ill. Rev. Stat. 1977, ch. 40, par. 602) reemphasize the principle stated in *Nye* v. *Nye* (1952), 411 Ill. 408, that the focus of custody determinations must be the welfare of the child.

The chief issue in this case is whether a change of custody predicated upon the open and continuing cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children. Considering the principles previously enunciated, and the statutory provisions, and prior decisions of the courts of this State, we conclude that under the facts in this case the trial court properly transferred custody of the Jarrett children from Jacqueline to Walter Jarrett.

The relevant standards of conduct are expressed in the statutes of this State: Section 11-8 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 11-8) provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." In *Hewitt* v. *Hewitt* (1979), 77 Ill. 2d 49, 61-62, we emphasized the refusal of

the General Assembly in enacting the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, par. 101 *et seq.*) to sanction any nonmarital relationships and its declaration of the purpose to "strengthen and preserve the integrity of marriage and safeguard family relationships" (Ill. Rev. Stat. 1977, ch. 40, par. 102(2)).

Jacqueline argues, however, that her conduct does not affront public morality because such conduct is now widely accepted, and cites 1978 Census Bureau statistics that show 1.1 million households composed of an unmarried man and woman, close to a quarter of which also include at least one child. This is essentially the same argument we rejected last term in *Hewitt* v. *Hewitt* (1979), 77 Ill. 2d 49, and it is equally unpersuasive here. The number of people living in such households forms only a small percentage of the adult population, but more to the point, the statutory interpretation urged upon us by Jacqueline simply nullifies the fornication statute. The logical conclusion of her argument is that the statutory prohibitions are void as to those who believe the pro-

scribed acts are not immoral, or, for one reason or another, need not be heeded. So stated, of course, the argument defeats itself. The rules which our society enacts for the governance of its members are not limited to those who agree with those rules—they are equally binding on the dissenters. The fornication statute and the Illinois Marriage and Dissolution of Marriage Act evidence the relevant moral standards of this State, as declared by our legislature. The open and notorious limitation on the former's prohibitions reflects both a disinclination to criminalize purely private relationships and a recognition that open fornication represents a graver threat to public morality than private violations. Conduct of that nature, when it is open, not only violates the statutorily expressed moral standards of the State, but also encourages others

to violate those standards, and debases public morality. While we agree that the statute does not penalize conduct which is essentially private and discreet (*People* v. *Cessna* (1976), 42 Ill. App. 3d 746, 749), Jacqueline's conduct has been neither, for she has discussed this relationship and her rationalization of it with at least her children, her former husband and her neighbors. It is, in our judgment, clear that her conduct offends prevailing public policy. *Lyman* v. *People* (1902), 198 Ill. 544, 549-50; *Searls* v. *People* (1852), 13 Ill. 597, 598; *People* v. *Potter* (1943), 319 Ill. App. 409, 410-11, 416.

Jacqueline's disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them (see *Stark* v. *Stark* (1973), 13 Ill. App. 3d 35; *Brown* v. *Brown* (1977), 218 Va. 196, 237 S.E.2d 89), and could well encourage the children to engage in similar activity in the future. That factor, of course, supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children.

It is true that, as Jacqueline argues, the courts have not denied custody to every parent who has violated the community's moral standards nor do we now intimate a different rule. Rather than mechanically denying custody in every such instance, the courts of this State appraise the moral example currently provided and the example which may be expected by the parent in the future. We held in *Nye* v. *Nye* (1952), 411 Ill. 408, 415, that past moral indiscretions of a parent are not sufficient grounds for denying custody if the parent's present conduct establishes the improbability of such lapses in the future. This rule focuses the trial court's attention on the moral values which the parent is actually demonstrating to the children.

Since the decison in *Nye,* the appellate courts of this State have repeatedly emphasized this principle, particularly when the children were unaware of their parent's moral indiscretion. (*Hendrickson* v. *Hendrickson*

actual rather than presumptive unfitness, when the State accords that protection to other parents, deprives him of equal protection of the law.

The case before us is fundamentally different. The trial court did not presume that Jacqueline was not an adequate parent, as the juvenile court in effect did in *Stanley*. Rather the trial court recognized that the affection and care of a parent do not alone assure the welfare of the child if other conduct of the parent threatens the child's moral development. Since the evidence indicated that Jacqueline had not terminated the troublesome relationship and would probably continue it in the future, the trial court transferred custody to Walter Jarrett, an equally caring and affectionate parent whose conduct did not contravene the standards established by the General Assembly and earlier judicial decisions. Its action in doing so was not contrary to the manifest weight of the evidence.

Accordingly, we reverse the judgment of the appellate court and affirm the judgment of the circuit court of Cook County.

Appellate court reversed;
circuit court affirmed.

APPENDIX C

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

February 12, 1980

Mr. Arthur M. Solomon
Attorney at Law
Solomon & Behrendt
7 South Dearborn St., Suite 1520
Chicago, IL 60603

In re: Jacqueline Jarrett, appellee,
vs. Walter Jarrett, appellant
No. 51431

Dear Mr. Solomon:

This office has today received from the Reporter of Decisions the dissenting opinion of Mr. Justice Moran (Mr. Chief Justice Goldenhersh joining therein) concerning the above entitled cause.

Will you please attach the enclosed dissent to the opinion previously forwarded to you.

Very truly yours,
Clerk of the Supreme Court

MR. JUSTICE MORAN, with whom MR. CHIEF JUSTICE GOLDENHERSH joins, dissenting:

I join in the dissent of the chief justice, but also dissent separately. My primary disagreement with the majority lies with its countenancing a change of custody based solely on a *conclusive presumption* that harm to the Jar-

rett children stemmed from Jacqueline's living arrangements. The majority purports to follow the Illinois Marriage and Dissolution of Marriage Act. Yet, under that act, only on the basis of fact can there be a finding that a change in circumstances has occurred and that modification of the prior custody judgment is necessary to serve the best interest of the children. (Ill. Rev. Stat. 1977, ch. 40, par. 610(b).) The court is not to consider conduct of a custodian if that conduct does not affect his relationship to the child. (Ill. Rev. Stat. 1977, ch. 40, par. 602(b).) In this case, not one scintilla of actual or statistical evidence of harm or danger to the children has been presented. To the contrary, all of the evidence of record, as related by the majority, indicates that under Jacqueline's custodianship the children's welfare and needs were met. Also, the trial court expressly declined to find Jacqueline unfit. Nevertheless, the majority's finding of a violation of the seldom-enforced fornication statute effectively foreclosed any further consideration of the custody issue. Instead of focusing solely on the best interest of the children—the "guiding star" (*Nye* v. *Nye* (1952), 411 Ill. 408, 415)—the majority has utilized child custody as a vehicle to punish Jacqueline for her "misconduct." Such selective enforcement of a statute is inappropriate and, especially in the child-custody context, unfortunate.

The majority decision also is at odds with the principle of *Stanley* v. *Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208. The constitutional infirmity of the statutory presumption in *Stanley* casts doubt on the validity of the judicially created conclusive presumption in this case. After *Stanley*, an unwed father may not be deprived of his illegitimate children without a prior hearing to determine his actual fitness. Similarly, Jacqueline should not be deprived of the children in the absence of evidence that a change is necessary to serve the best interest of the children. A hearing at which custody is determined on the basis of the conclusive presumption sanctioned by the majority amounts to no hearing at all.

APPENDIX D

Third Division
9/13/78

No. 77-1321

JACQUELINE JARRETT,

Plaintiff-Appellant,

vs.

WALTER JARRETT,

Defendant-Appellee.

Appeal From The Circuit Court Of Cook County.
Honorable MARION E. BURKS, *Presiding.*

Mr. PRESIDING JUSTICE JIGANTI delivered the opinion of the court:

This is an appeal by the plaintiff, Jacqueline Jarrett, from an order of the trial court awarding a change of custody to the defendant, Walter Jarrett, pursuant to his petition. The issue presented for review is whether there was a change of circumstances detrimentally affecting the welfare of the minor children which warranted a change of custody.

On December 6, 1976, the plaintiff was awarded a judgment for divorce on the grounds of extreme and repeated mental cruelty. Pursuant to the judgment order and Property Settlement Agreement, the plaintiff, having been found to be a fit and proper person, was granted sole care, custody, control and education of the three daughters of the couple, then aged 12, 10 and 7. The defendant was granted visitation rights "at all reasonable times."

In April, 1977, Jacqueline informed Walter that Wayne Hammon, would be moving into the family home where she and the children lived. Walter protested this arrangement, but Hammon moved into the residence on May 1, 1977.

Walter subsequently filed a petition for change of custody, and, on July 12, 1977, a postdecree hearing was held. At the hearing, testimony showed that since the divorce, Walter had visited with the children every weekend, usually picking them up every Saturday evening, taking them to church, and then preparing their dinner. The girls would stay overnight and spend all day Sunday with him, returning home at about 5 p.m. The children are being raised in the Roman Catholic religion, and Jacqueline takes the children to religious instruction on Saturdays.

Walter testified that Jacqueline's living arrangement was contrary to his own personal beliefs and that he would not want his children to be raised in that atmosphere. He stated that he believed it was an improper moral climate and that he had certain ideals which he would like to be able to instill in his children. He further testified that when he picks the children up at Jacqueline's home every weekend, they have always been clean, healthy, well-dressed and well-nourished. He stated that he had spoken with his oldest daughter, Kathleen, about Hammon and the living arrangement, and she expressed no serious objections, except that occasionally he would yell at them when they made noise or something of that nature.

Wayne Hammon testified that the children refer to him as Wayne, and that he disciplines the children verbally from time to time. He and Jacqueline had discussed their situation with the children from time to time in terms of different people having different beliefs and that their father felt one way about it while they felt

another, and that what mattered was that they loved each other. Hammon was acquainted with the neighbors, and had attended school functions with the children. He and the children had fun together and seemed to get along. He paid the children their allowances out of his money.

Jacqueline Jarrett testified that the children have lived in the present family home in Mount Prospect all their lives. She and her neighbor alternate driving her oldest daughter to school before eight-thirty, when Jacqueline leaves for work. The two younger girls, who do not have to be in school until nine o'clock, can walk to school without having to cross a street. When the children are not in school, she has a part-time sitter who stays with the children until Hammon gets home. The children are very fond of Hammon and show him affection, although when they first learned that he would be moving in, they were not "overly enthused about it." They asked if they were going to get married, and Jacqueline told them she did not know. She explained to the children that some people think it is wrong for two people to live together without a marriage license, but that such was not her feeling. She testified that she did not want to get married at that time because it was too soon after the divorce, that she did not believe a marriage license "makes a relationship," that the divorce judgment provides that upon remarriage she must sell the house within six months and the children did not want to move, and that she could not afford it on her present salary. Hammon helps the children with their homework, and they go to shows, play games and participate in other activities as a family unit. Jacqueline stated that the love she and Hammon feel for each other very definitely manifested itself to the children and that her children were developing their own sets of values as individuals and not as duplicates of herself.

The trial court granted the defendant's petition, stating that it was "necessary for the moral and spiritual well-being and development" of the children that they reside with the defendant rather than the plaintiff and on July 19, 1977, the amended judgment order was entered granting Walter custody of the three children. Jacqueline's petition for a rehearing and motion for a stay pending appeal were denied. The sole issue presented for review is whether the fact that an unmarried male moved into the family residence with Jacqueline and her children constituted a change of circumstances which so detrimentally affected the welfare of the children that it was in their best interests to require a change in custody.

It is well settled in Illinois that a judgment for divorce cannot be modified or amended unless there has been a material change of circumstances since its entry. (*Jacobs* v. *Jacobs* (1974), 25 Ill. App. 3d 175, 177, 323 N.E.2d 21, *Taylor* v. *Taylor* (1961), 32 Ill. App. 2d 45, 48, 176 N.E.2d 640.) Every presumption is indulged in favor of the validity of the judgment, and it its provisions are to be changed, the burden of proof is on the moving party to show why the change should be made. (*Jacobs* at 170; *Eggemeyer* v. *Eggemeyer* (1967), 86 Ill. App. 2d 224, 230, 229 N.E.2d 144; *Abbott* v. *Abbott* (1976), 40 Ill. App. 3d 348, 350, 352 N.E.2d 317.) The evidence must establish that the parent to whom custody of the children was originally awarded is unfit to retain custody or that a change of conditions makes a change of custody in their best interests. *Vanderlaan* v. *Vanderlaan* (1972), 9 Ill. App. 3d 260, 264, 292 N.E.2d 145; *Stickler* v. *Stickler* (1962), 38 Ill. App. 2d 191, 186 N.E.2d 542.

In all matters concerning the custody of children, the paramount issue is their welfare. The fact of changed conditions, in itself, is not sufficient to warrant modification of the custody provisions of the decree absent a finding that such changed conditions affect the welfare of the children. (*Eggemeyer* at 231; *Jacobs* at 178;

Arden v. *Arden* (1960), 25 Ill. App. 2d 181, 186, 166 N.E. 2d 111; *Garland* v. *Garland* (1974), 19 Ill. App. 3d 951, 954, 312 N.E.2d 811.)

> " 'In determining whether there have been changed conditions the court must keep in view primarily the welfare of the child. The custody of the child is not awarded for the purpose of gratifying the feelings of either parent or with any idea of punishing or rewarding either parent.' *Hamilton* v. *Anderson,* 176 Ark. 76, 2 S.W.(2d) 673." *Maupin* v. *Maupin* (1950), 339 Ill. App. 484, 489, 90 N.E.2d 234; *Wade* v. *Wade* (1951), 345 Ill. App. 170, 180, 102 N.E.2d 356; *Arden* at 186.

While the trial court has broad discretion in such cases, such discretion is not unlimited but is subject to review and will be reversed if exercised in a manner contrary to the manifest weight of the evidence. (*Eaton* v. *Eaton* (1977), 50 Ill. App. 3d 306, 310, 365 N.E.2d 647; *Comiskey* v. *Comiskey* (1977), 48 Ill. App. 3d 17, 24, 366 N.E.2d 87.) Since the children and the parents are entitled to a certain degree of finality and conclusiveness when an order of custody is entered, (*Collings* v. *Collings* (1970), 120 Ill. App. 2d 125, 128, 256 N.E.2d 108), the person seeking a change of custody must positively demonstrate that the change is necessary for the welfare of the children. *King* v. *Vancil* (1975), 34 Ill. App. 3d 831, 834, 836, 341 N.E.2d 65.

The original judgment order found Jacqueline to be a fit and proper person to have sole responsibility for the care, custody, control and education of the children. Such an award must be viewed as embracing all the ramifications of those terms, including the development of a person by fostering to varying degrees of growth or expansion of knowledge, wisdom, desirable qualities of mind or character, physical health, or general competence. Evidence in the instant case raised no question of Jacqueline's fitness as a good mother who properly cared for

the physical and emotional needs of her daughters. The question raised by the defendant is whether her open relationship with Hammon constitutes such a disregard for community standards as to endanger her children's moral well-being.

The defendant points out that the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, par. 610(3)) provides that a custody judgment can be modified where "the child's present environment endangers seriously his * * * moral or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages to him." However, the courts of this State have often allowed women whose behavior society may have considered to be questionable to retain custody of their children or have refused to change custody in the absence of any evidence that the "imprudence" was detrimental to the child's welfare. (*See Eaton* v. *Eaton* (1977), 50 Ill. App. 3d 306, 365 N.E.2d 647; *Hendrickson* v. *Hendrickson* (1977), 49 Ill. App. 3d 160, 364 N.E.2d 566; *Christiansen* v. *Christiansen* (1975), 31 Ill. App. 3d 1041, 335 N.E.2d 581; *VanBuskirk* v. *VanBuskirk* (1974), 19 Ill. App. 3d 647, 312 N.E.2d 395; *Collings* v. *Collings* (1970), 120 Ill. App. 2d 125, 256 N.E.2d 108; *Arden* v. *Arden* (1960), 25 Ill. App. 2d 181, 166 N.E.2d 111; *Brown* v. *Brown* (1957), 13 Ill. App. 2d 56, 140 N.E.2d 528; *Nye* v. *Nye* (1952), 411 Ill. 408, 105 N.E.2d 300).

We also note that the Illinois Marriage and Dissolution of Marriage Act provides that in determining custody in accordance with the best interests of the child, "[t]he court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." (Ill. Rev. Stat. 1977, ch. 40, par. 602(b).) By statutory mandate, it is not our function to approve or disapprove Jacqueline's conduct, but only to determine its effect upon the children.

In the case at bar, it has neither been contended nor proved that Jacqueline was not a kind, affectionate mother; neither has it been shown that she neglected her children in any way. No fault was found or disclosed as to the appearance, health, or stability of the children or of the condition of the home. The schooling and religious training of the girls was being attended to by Jacqueline, who took them to religious classes every Saturday morning as well as by their weekly attendance at church with their father. It is evident that Jacqueline Jarrett, Wayne Hammon, and the three Jarrett children function as a family unit. Hammon disciplines the children, helps them with their homework, plays with them. There was no noticeable disruption of the children's routine by Hammon's entry into their lives, nor were they subject to the vagaries of an unstable relationship, shuttled back and forth between residences, or given cause to suspect that anything of an improper nature was transpiring. There was no evidence of any feelings of guilt or fears aroused in the children. Jacqueline and Hammon were open in their feelings for each other, open in their relationship to the children and to their community. From the evidence in the record before us, they are mature adults and their relationship is not relevant here unless it is shown as having a negative effect on the children. (*Hendrickson* v. *Hendrickson* (1977), 49 Ill. App. 3d 160, 163, 364 N.E.2d 566.) In the absence of any evidence of such negative effects, we decline to indulge in speculation as to what effects might possibly "raise their ugly heads" at some future time, *Gehn* v. *Gehn* (1977), 51 Ill. App. 3d 946, 949, 367 N.E. 2d 508.

There was neither a specific finding of Jacqueline's unfitness nor evidence which would support that conclusion. Similarly we see no evidence to warrant the conclusion that a change of custody was necessary to serve the best interests of the children. We do find it to be an

abuse of discretion for the trial court to impose its own standard in this regard and infer, without any evidence in the record, that Jacqueline's conduct in living with a man to whom she was not married was detrimental to the welfare of the children and in and of itself sufficient to disqualify her as the custodian of the children. *Accord, In re Marriage of Moore* (1975), 33 Colo. App. 129, 531 P.2d 995.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

Reversed.

SIMON, *J., specially concurs.*

MCNAMARA, *J., dissents.*

Mr. JUSTICE SIMON specially concurring:

I concur fully in the court's opinion. In addition, I think it relevant to point out a circumstance which came to our attention during oral argument, indicating that the change of custody was unrealistic and likely to have been based more on the trial judge's adverse reaction to the living arrangements of Jacqueline and Wayne—neither of whom was married—than on consideration of the best interest of the children. After custody was transferred from Jacqueline to Walter, the children lived with Walter during the week but spent weekends at their mother's home. Thus, the children continued to be exposed to the same relationship between Jacqueline and Wayne that prompted the trial judge to grant a change of custody.

Whether right or wrong, it appears to be more and more common for a person, including a divorced parent, to live with one of the opposite sex without marriage. Prosecution by legal authority in such a situation today is extremely unusual. Realistically, if a divorced parent chooses to enter into such a living arrangement, there is no way to insulate his or her children from knowledge

of and exposure to the relationship the parent is maintaining, unless, perhaps, a court is willing to go to the extreme and unusual length of terminating the parent's visitation privileges. No one in this case has even suggested such a drastic and cruel approach. Here, living with their mother and Wayne on a permanent basis could not affect the children appreciably differently than spending weekends with their mother and Wayne after their custody was changed. In either case the children were fully exposed to their mother's relationship with Wayne and, therefore, that relationship in itself did not warrant a change in custody.

McNAMARA, *J.*, dissents.

The majority opinion finds that the wife is openly living with a man to whom she is not married, but holds that the trial court abused its discretion in concluding that such criminal conduct on her part constituted a material change of circumstances detrimentally affecting the welfare of the children and warranting a change in their custody. I rather think that the trial court would have committed manifest error if it had overlooked the wife's criminal conduct and had not placed the children in the custody of the father.

In *Hahn* v. *Hahn* (1966), 69 Ill. App.2d 302, 216 N.E.2d 229, the trial court transferred custody of the minor children from the wife to the husband because the wife had begun living in open adultery with a married man. The trial court took this action despite the fact that at about the time the petition for change of custody was filed, the married man had moved to Wisconsin. In affirming the trial court's action, this court stated at p. 305:

> "While the trial court found in this case that the evidence showed no sign of lack of affection nor was there evidence of physical neglect, certainly Dale's [the wife's] conduct cannot be considered conducive to the proper moral training that children of tender

years need. We argee with the trial court that the record here is void of evidence that would give any assurance that Dale intended to abandon her ways. In matters concerning the custody of infant children the court will not disturb the determination of the trial judge who has heard the evidence and has had an opportunity to observe the parties, unless it appears manifest injustice has been done." *Rodely* v. *Rodely,* 28 Ill.2d 347, 350, 192 N.E.2d 347.

In *Gehn* v. *Gehn* (1977), 51 Ill. App.3d 946, 367 N.E.2d 508, the trial court transferred the custody of five minor children from the wife to the husband on the ground that the wife "became deeply involved in an affair with her boyfriend who was separated but still married to his wife." This court affirmed the change of custody, stating at p. 949:

"The record in this case supports a finding that the plaintiff had no qualms in exposing and exhibiting to her children her illicit relationshp with her boyfriend. The plaintiff admits her immoral conduct, but argues that no testimony was presented which would show that her conduct had any ill effects upon the children. *It might be not only difficult but impossible to present evidence showing objective effects that such conduct would have on minor children.* The effects may well be subjective ones that will raise their ugly heads and make their presence known at some future time. *Certainly the conduct of the plaintiff cannot be regarded as good and wholesome moral training.* We further note that the plaintiff utterly failed to display any degree of *penitence* as far as her conduct was concerned, but on the contrary assured the court that if she continued to have custody of the children she would persist in the overnight sojourns to her boyfriend's house with her five children."

The majority dismiss the *Gehn* holding by stating that they decline to engage in speculation as to what effect plaintiff's conduct in the present case will have on her children in the future. While I do not agree that the *Gehn* court was engaged in speculation, the present record clearly reveals that the trial court was justified in transferring custody. The wife testified that she had explained to the children that she believed there was nothing wrong about her conduct and further testified that she was permitting the children to develop their own set of values. *When a mother teaches children that her own criminal conduct is proper, it is unlikely that she will be able to proscribe any future illegal activities of the children.* The trial court correctly found a material change of circumstances affecting the welfare of the children. It properly transferred custody of the children to the husband. The trial court's holding was not contrary to the manifest weight of the evidence, and I believe it should be affirmed.

APPENDIX E

Section 602: Best Interests of the Child.

"(a) The Court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors, including 1) the wishes of the child's parent or parents as to his custody; 2) the wishes of the child as to his custodian; 3) the interaction and interrelationship of the child with his parents or parent, his siblings and any other person who may significantly affect the child's best interests; 4) the child's adjustment to his home school and community; and 5) the mental and physical health of all individuals involved.

"(b) The Court shall not consider conduct of a present or proposed custodian that does not affect his relationship with the child.

Section 610. Modification.

"(b) The Court shall not modify a prior custody judgment unless it finds on the basis of the facts that have arisen since the prior judgment or have been unknown to the Court at the time of entry of the original judgment that a change has occurred in circumstances of the child or his custodian and that a modification is necessary to serve the best interests of the child. In applying these standards the Court shall retain the custodian appointed pursuant to the prior judgment unless . . . (3) the child's present environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change in environment is outweighted by the benefits to him . . ."